Boon Chin Fatt v Yii Chee Wee & Anor and another appeal

HIGH COURT (MIRI) — CIVIL APPEAL NOS MYY-12B-10/9 OF 2013 AND MYY-12B-2/1 OF 2014
STEPHEN CHUNG J
24 JANUARY 2014

Tort — Negligence — Road accident — Appeal against decision of sessions court judge — Apportionment of liability — Whether fair — Driver was driving with passenger at junction controlled by traffic lights and collided with another car — Whether both parties at fault since one 'jumped red traffic light' and was speeding while other failed to look out before turning — Whether there was contributory negligence — Appeals against liability and quantum of damages

The first appellant ('the first plaintiff') was driving with the second appellant ('the second plaintiff') as a passenger when, at a junction controlled by traffic lights, the respondent ('the defendant'), who was driving his vehicle in the opposite direction, collided with the vehicle driven by the first plaintiff. The first and second plaintiffs were injured in the collision and admitted to hospital. The plaintiffs alleged that the defendant was, inter alia, driving at excessive speed, had 'jumped the red light' at the junction and had encroached or cut across the right of way of the first plaintiff which caused the collision. The defendant denied the allegations of the plaintiffs and argued that it was the first plaintiff who had failed to obey the traffic lights at the junction and had swerved across his right of way when the first plaintiff made a turn. In his judgment, the sessions court judge ('the trial judge') ruled that there were faults equally on both sides. He further ruled ruled that the first plaintiff's fault was a failure to have a look out before turning right into the junction and the defendant's fault was driving above 90km per hour in trying to beat the amber light facing him at the junction. The trial judge ruled that the first plaintiffs claim that he had the green light could not be justified as his police report was lodged eight days after the accident and he did not fully explain the delay in making the report. Furthermore, the medical reports did not state that he was unconscious for so long and thus he ought to have lodged the report after he was awaken and when he was in the position to do so. The trial judge said that the lapse of eight days could not be ignored by the court thus the issue of veracity and accuracy had arisen. He was of the opinion that the report was not contemporaneous because the plaintiffs had appointed solicitors to advise them. The trial judge ruled that the defendant's police report was more credible because it was lodged on the night, shortly after the accident. The trial judge had found the defendant liable for loss and damages to the first and second appellant on 50% and 100% liability, respectively, for the accident. The trial judge awarded RM72,600 and RM16,997.45 as general and special damages,

respectively, to the first plaintiff. The trial judge awarded the second plaintiff with RM342,800 as and RM17,332.65 as general and special damages. The trial judge also awarded costs of RM13,913 to the plaintiffs. There are two appeals in this case. The defendant appealed against the decision of the trial judge both on the liability and quantum of the damages awarded to the plaintiffs while the first plaintiff filed an appeal only against the finding of 50% liability against him.

Held, allowing the appeals:

(1) The date or delay in lodging a report should not be the primary reason for the accuracy or veracity of the report lodged. Based on the appeal record, the defendant was not injured in the collision and was able to lodge his report shortly after the collision whereas the first and second plaintiffs were injured in the collision (see para 11).

(2) There was no evidence and no inference which could be drawn that there was any delay or intended delay in making the report by the first plaintiff which could raise any doubts on the veracity of the report. The accuracy or veracity of the reports should be determined by the contents of the reports and on the testimony of the witnesses in the trial and not on the delay or on the date the reports were made. The trial judge had erred and misconstrued the evidence adduced (see para 13).

(3) The award of RM40,000 for these injuries was within the range normally awarded by courts. The award made by the trial judge was not excessive, within the range and there was no reason to disturb that finding. However, the first plaintiff should receive RM28,000 instead of RM20,000 based on the above apportionment of liability made by this court (see para 29).

(4) On the cost of nursing care, the first plaintiff was cared by his parents at home. The trial judge awarded RM2,100 ie at RM700 for six months to the first plaintiff for the nursing care. There was no evidence whether his parents were gainfully employed and had to give up employment to look after him. There was no evidence of their salaries. There was also no evidence that he could not look after himself for six months (see para 30).

(5) There was no evidence that the first plaintiff would face a real or substantial risk in his earning capacity being affected in future due to any disability sustained in the collision. The first plaintiff had not shown that he was entitled to the award on the loss of his earning capacity made in his favour by the trial judge. The appeal by the defendant on this appeal was allowed and the award of RM48,000 was set aside (see para 40).

(6) The first plaintiff, in turning right at the junction knew or should have known that there were vehicles entering the junction from the opposite direction. He knew or should have observed that these vehicles were

travelling at high speed and it was reasonably foreseeable that there would be a collision if he turned right across the path of these vehicles if it was not safe to do so. In such a situation, the first plaintiff should have waited at the traffic light to ensure that it was safe for him to turn right at the junction in order to avoid the collision notwithstanding his testimony that he had the green light. In not waiting and to avoid the collision he was guilty of contributory negligence. The apportionment of liability should be 30% in favour of the first plaintiff and 70% against the defendant (see paras 20–21).

[Bahasa Malaysia summary

Perayu pertama ('plaintif pertama') sedang memandu dengan perayu kedua ('plaintif kedua') sebagai penumpang apabila, pada simpang yang dikawal oleh lampu trafik, responden ('defendan') yang memandu kenderaannya dari arah bertentangan, berlanggar dengan kenderaan yang dipandu oleh plaintif pertama. Plaintif pertama dan kedua cedera dalam pelanggaran dan dikejarkan ke hospital. Plaintif mendakwa bahawa defendan, antara lain, memandu melebihi had laju dan telah melanggar lampu merah di simpang dan masuk atau terus ke laluan plaintif pertama yang mana menyebabkan pelanggaran. Defendan menafikan dakwaan-dakwaan plaintif dan menghujahkan bahawa plaintif pertama yang gagal mematuhi lampu trafik pada simpang dan terus membelok ke laluan defendan apabila plaintif pertama membuat pusingan. Dalam penghakiman beliau, hakim mahkamah sesyen ('hakim bicara') memutuskan bahawa terdapat kesalahan sama rata antara kedua-dua pihak. Beliau memutuskan selanjutnya bahawa kesalahan plaintif pertama adalah kegagalannya untuk melihat terlebih dahulu sebelum membelok masuk simpang dan kesalahan defendan adalah memandu melebihi 90km sejam dalam cuba untuk mengatasi lampu kuning di hadapannya di simpang. Hakim bicara memutuskan bahawa tuntutan plaintif pertama bahawa di hadapannya adalah lampu hijau tidak boleh dijustifikasikan kerana laporan polis dibuat lapan hari selepas kemalangan tersebut dan dia tidak membuat penjelasan penuh dalam membuat laporan tersebut. Tambahan lagi, laporan perubatan tidak menyatakan bahawa dia tidak sedar buat tempoh yang lama dan oleh itu, dia sewajarnya membuat laporan selepas dia sedar dan berada dalam keadaan untuk berbuat sedemikian. Hakim bicara menyatakan bahawa kelewatan selama lapan hari tidak boleh diabaikan oleh mahkamah dan oleh itu, timbul isu kebenaran cakap dan ketepatan. Beliau berpendapat bahawa laporan tersebut bukanlah laporan yang semasa kerana plaintif-plaintif telah melantik peguamcara untuk menasihatkan mereka. Hakim bicara memutuskan bahawa laporan polis defendan adalah lebih kredibel kerana ia dilaporkan pada malam sejurus selepas kemalangan. Hakim bicara mendapati defendan bertanggungan bagi kerosakan dan kerugian kepada perayu pertama dan kedua masing-masing sebanyak 50% dan 100% bagi kemalangan tersebut. Hakim bicara mengawardkan RM72,600 dan RM16,997.45 sebagai ganti rugi am dan khas, masing-masing kepada plaintif pertama. Hakim bicara juga

A mengawardkan RM13,913 kepada plaintif-plaintif. Terdapat dua rayuan dalam kes ini. Defendan merayu terhadap keputusan hakim bicara bagi liabiliti dan kuantum ganti rugi yang diawardkan kepada plaintif-plaintif manakala plaintif pertama memfailkan satu rayuan sahaja terhadap dapatan 50% liabiliti terhadapnya.

B

Diputuskan, menolak rayuan-rayuan:

(1) Tarikh atau kelewatan dalam membuat laporan tidak boleh menjadi sebab utama bagi ketepatan atau kebenaran cakap laporan yang dibuat. Berdasarkan rekod rayuan, defendan tidak tercedera dalam kemalangan C tersebut dan boleh membuat laporan sejurus selepas kemalangan manakan plaintif pertama dan kedua tercedera dalam kemalangan (lihat perenggan 11).

(2) Tiada keterangan dan inferens yang boleh disimpulkan bahawa ada D kelewatan atau kelewatan yang disengajakan dalam membuat laporan oleh plaintif pertama yang boleh membangkitkan keraguan terhadap kebenaran laporan tersebut. Ketepatan atau kebenaran laporan mestilah diputuskan oleh kandungan laporan-laporan dan berdasarkan keterangan saksi-saksi dalam perbicaraan dan bukan kelewatan atau pada E tarikh laporan tersebut dibuat. Hakim bicara terkhilaf dan tersalah tafsir keterangan yang dikemukakan (lihat perenggan 13).

(3) Award RM40,000 bagi kecederaan-kecederaan ini adalah dalam skop yang kebiasaannya diawardkan oleh mahkamah. Award yang diberikan F oleh hakim bicara tidak berlebihan, dalam skop dan tiada alasan untuk campur tangan dapatan tersebut. Walau bagaimanapun, plaintif pertama sepatutnya menerima RM28,000 dan bukan RM20,000 berdasarkan pembahagian liabiliti yang dibuat oleh mahkamah (lihat perenggan 29).

(4) Mengenai kos penjagaan kejururawatan, plaintif dijaga oleh ibu bapanya G di rumah. Hakim bicara mengawardkan RM2,100 iaitu RM700 bagi enam bulan kepada plaintif pertama untuk penjagaan kejururawatan. Tiada keterangan mengenai sama ada ibu bapanya digajikan dan terpaksa berhenti kerja untuk menjaganya. Tiada keterangan mengenai gaji mereka. Tiada juga keterangan bahawa dia tidak boleh menjaga diri H sendiri selama enam bulan (lihat perenggan 30).

(5) Tiada keterangan bahawa plaintif pertama akan menghadapi risiko sebenar atau besar dalam kesan kapasiti pendapatannya pada masa hadapan akibat kecacatan yang dialaminya semasa pelanggaran. Plaintif I pertama tidak menunjukkan bahawa dia berhak ke atas award bagi kehilangan kapasiti pendapatan yang dibuat untuknya oleh hakim bicara. Rayuan defendan terhadap rayuan ini dibenarkan dan award RM48,000 diketepikan (lihat perenggan 40).

(6) Plaintif pertama, dalam membuat pusingan di simpang tersebut tahu

atau sepatutnya tahu bahawa terdapat kenderaan-kenderaan yang memasuki simpang dari arah bertentangan. Dia tahu atau sepatutnya melihat bahawa kenderaan-kenderaan tersebut bergerak dengan laju dan boleh dijangka secara munasabah bahawa akan berlaku pelanggaran sekiranya dia belok ke kanan melintas jalan kenderaan-kenderaan ini sekiranya ia tidak selamat untuk berbuat demikian. Dalam keadaan demikian, plaintif pertama sepatutnya menunggu di lampu trafik untuk memastikan bahawa adalah selamat untuknya membelok ke kanan untuk mengelakkan kemalangan walaupun keterangannya menyatakan bahawa lampu di bahagiannya adalah hijau. Dalam tidak menunggu dan mengelakkan pelanggaran, dia bersalah atas cuai sumbang. Pembahagian liabiliti sepatutnya 30% berpihak kepada plaintif pertama dan 70% terhadap defendan (lihat perenggan) 20–21.]]]]]]]

Notes

For cases on road accident, see 12(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 1601–1900.

Cases referred to

Andi Firdaus b Yusmar v Mohd Khir b Muda [2009] 1 PIR 46, SC (refd)
Buhari bin Sabiren & Anor v Sea Kee Feng [2000] MLJU 558; [2000] 8 CLJ 51, HC (refd)
Cin Kon Wah @ Chin Kon Wah (dilantik sebagai wakil diri harta pesaka si mati, Chin Hon Wei dan membawa tindakan ini di bawah Seksyen 8 Akta Undang-Undang Sibil 1956 & Anor v Cheah Chee Meng & Anor [2009] 1 PIR 24, SC (refd)
Conlay Construction Sdn Bhd v Perembun (M) Sdn Bhd [2014] 1 MLJ 80, FC (refd)
Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1; [2004] 4 CLJ 309, FC (refd)
Hashim @ Hashim bin Md Yunus v Azman bin Abas & Anor [1999] MD 539 (refd)
Lee Kwai Heong & Anor v PP [2006] 2 MLJ 528; [2006] 1 CLJ 1043, CA (refd)
Mahmod bin Kalian v Goh Seng Choon & Anor [1976] 2 MLJ 239, FC (refd)
Poi Kuen Mun (f) & Ors v Ng Wei Choo [1983] 2 MLJ 289 (refd)
Roslie b Husin v Vijayan a/l Subramaniam & Anor [2007] 1 PIR 78, SC (refd)
Samar binte Mansor v Mustafa Kamarul Ariffin [1974] 2 MLJ 71, FC (refd)
Sumarni v Yow Bing Kwong & Anor [2008] 1 MLJ 608; [2008] 3 CLJ 489, CA (refd)
Tan Kuan Yau v Suhindrimani [1985] 2 MLJ 22; [1985] 1 CLJ 429, SC (refd)
Teong Ai Meng v Tan Boon Seng & Anor [2001] MCL (Dec) 944 (refd)
United Plywood And Sawmill Ltd v Lock Ngan Loi [1970] 2 MLJ 237, FC (refd)

A *Yang Yap Fong & Anor v Leong Pek Hoon & Anor* [1987] 2 MLJ 201; [1987] 1 CLJ 377, SC (refd)
Zul Hasyimi b Shahidan & Ors v Mohana a/l Raja Gopal & Ors [2011] 1 PIR 40, SC (refd)

B *Bibi Waheeda (Shad & Partners) for the first and second plaintiffs.*
Zaidah bt Yak (Yong Wong & Chin) for the defendant.

Stephen Chung J:

C **[1]** There are two appeals heard together. In these appeals I shall refer to the appellants or parties as the first and second plaintiffs and the defendant respectively as in the case in the Sessions Court, Miri.

[2] On 27 August 2013, after a trial, the sessions court judge found the
D defendant liable for loss and damages to the first plaintif, who was the driver of a Viva motor vehicle QSR1552, on 50% liability for the accident and to the second plaintif, who was a passenger in the motor vehicle driven by the first plaintif, on 100% liability for the accident. The trial judge awarded the first plaintif RM72,600 as general damages and RM16,997.45 as special damages.
E The trial judge awarded the second plaintif RM342,800 as general damages and RM17,332.65 as special damages. The trial judge also awarded costs of RM13,913 to the plaintifs.

[3] The defendant appealed against the decision of the trial judge both on
F the liability and quantum of the damages awarded to the plaintifs whereas the first plaintif has filed an appeal only against the finding of 50% liability against him. The grounds of the appeals are set out in the respective memorandum of appeal.

G **[4]** The facts are as follows. On 6 February 2012 at about 9.40pm, the first plaintif was driving the Viva vehicle along Jalan Pujut/Kuala Baram from Permyjaya, Tudan in the direction of Pasar Lutong, Miri. At a junction controlled by traffic lights, as the first plaintif turned right towards Pasar Lutong, the defendant, who was driving his Toyota vehicle BAE2212 in the
H opposite direction along Jalan Pujut/Kuala Baram, collided with the vehicle driven by the first plaintif. The first and second plaintifs were injured in the collision and admitted to hospitals.

I

[5] The plaintifs alleged that the defendant was, inter alia, driving at excessive speed, had 'jumped the red light' at the junction and had encroached or cut across the right of way of the first plaintif which caused the collision. The particulars of negligence were pleaded and set out in the plaintifs' statement of claim.

[6] The defendant denied the allegations of the plaintifs. Instead, the defendant pleaded, inter alia, that it was the first plaintif who had failed to obey the traffic lights at the junction and had swerved across his right of way when the first plaintif turned right towards Pasar Lutong knowing that it was not safe to do so. The particulars of negligence were similarly pleaded in his defence and counterclaim.

[7] Beside the plaintifs and the defendant who testified in the trial, there was no other eye witness in the trial. In an appeal, an appellate court has a duty to examine critically the whole of the evidence adduced at the trial and the conclusions of the trial judge including his assessments of the credibility and truthfulness of the witnesses who have testified in the trial. An appellate court will not normally intervene unless the trial court is shown to be plainly wrong in arriving at its decision. An appellate court will only intervene where there has been no or insufficient judicial appreciation of the evidence or if crucial evidence has been misconstrued.

[8] A trial judge who is required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. He must, when deciding whether to accept or to reject the evidence of a witness, test it against relevant criteria. He must also test the evidence of the particular witness against the probabilities of the case and whether the witness's story is inherently consistent or credible against the contemporaneous documents or other credible circumstantial evidence and or other corroborative evidence adduced in the trial. The appellate court will normally defer to this finding on the credibility of the witness made by the trial judge who has the advantage of hearing and seeing the witnesses during the trial. An appellate court in order to reverse the decision of the trial judge must not only entertain doubts whether the decision is right but be convinced that it is wrong: see *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1; [2004] 4 CLJ 309, *Conlay Construction Sdn Bhd v Perembun (M) Sdn Bhd* [2014] 1 MLJ 80, *Lee Kwai Heong & Anor v Public Prosecutor* [2006] 2 MLJ 528; [2006] 1 CLJ 1043.

[9] In his judgment the trial judge ruled that there were faults equally on both sides. He ruled that the first plaintif's fault was a failure to have a look out before turning right into the junction and the defendant's fault was driving above 90km per hour in trying to beat the amber light facing him at the junction.

[10] The trial judge ruled that the first plaintif's claim that he had the green light could not be justified as his police report was lodged eight days after the accident and he did not fully explain the delay in making the report. The trial judge found that it was strange that the report was not immediately lodged after the accident, as soon as he had regained consciousness. The trial judge found that the medical reports did not state that he was unconscious for so long and thus he ought to have lodged the report after he was awaken and when he was in the position to do so. The trial judge said that the lapse of eight days could not be ignored by the court thus the issue of veracity and accuracy had arisen. He was of the opinion that the report was not contemporaneous because the plaintifs had appointed solicitors to advise them. The trial judge ruled that the defendant's police report was more credible because it was lodged on the night, shortly after the accident.

[11] With due respect, the date or delay in lodging a report should not be the primary reason for the accuracy or veracity of the report lodged. In this case, based on the appeal record, the defendant was not injured in the collision and was able to lodge his report shortly after the collision whereas the first and second plaintifs were injured in the collision. They were taken in an ambulance to Miri Hospital. The second plaintif was admitted to Miri Hospital. The first plaintif was transferred to Columbia Asia Medical Centre and then to Miri City Medical Centre (MCMC) because there was no specialist to attend to him at that time. The first plaintif was eventually admitted to MCMC on 7 February 2012, at 4am. He was operated and treated by Dr Mathew Kho at MCMC until he was discharged from MCMC on 17 February 2012.

[12] The facts showed that Chief Inspector Fauzi bin Sabri recorded the police report of the first plaintif as part of police investigation into the accident on 14 February 2012 while he was still warded at MCMC. He was not ambulatory and could not go to the police station to lodge his report then. He was only discharged from MCMC on 17 February 2012. That would be the first opportunity for him to lodge the report after his discharge if C/I Fauzi had not recorded the report earlier.

[13] On the facts, there was no evidence and no inference which could be drawn that there was any delay or intended delay in making the report by the first plaintif which could raise any doubts on the veracity of the report. The accuracy or veracity of the reports should be determined by the contents of the reports and on the testimony of the witnesses in the trial and not on the delay or on the date the reports were made. In this respect the trial judge had erred and misconstrued the evidence adduced.

[14] On the issue of liability, PW2, who was the investigation officer ('IO') of the police case on the collision, arrived at the scene of the accident shortly after the collision. He took photographs (exhs 28(1) and (2)) and made a sketch plan (exhs P27(1) and (2)) at the scene. Based on his investigation PW2 concluded that the traffic lights facing the plaintifs were green when the first plaintif turned right towards Pasar Lutong and that the defendant was driving at a fast speed when he entered the junction which resulted in the collision. He concluded that the defendant was to be blamed for the collision. However, the trial judge ruled that the opinion of the IO was without any basis because he was wrong on the speed limit of 80km per hr. The trial judge said that the speed limit in Sarawak was 90km per hr and he assumed that that was the speed limit for that road.

[15] The record of appeal showed that the defendant had testified that at that time the traffic lights were amber when he approached the junction and it turned red when he entered the yellow box (painted on the road) so he continued to the other side of the junction. He said it was safe for him to do so. The trial judge accepted the defendant's testimony. The trial judge said it would take a few seconds for the traffic lights to turn green and that the plaintifs' case that he had green lights when he turned right towards Pasar Lutong could not be correct. The trial judge said the first plaintif should look out and exercised care before he turned right in the path of the defendant's vehicle. Therefore he apportioned liability equally between the first plaintif and the defendant.

[16] However, the record of appeal showed that the defendant had testified and in his witness statement (DWS2) (at p 510 of the appeal record) that the first plaintif had made a U-turn at the traffic light junction and that he was not in time to brake and hit the Viva. It must be noted that this allegation of U-turn was not pleaded and was contrary to his allegations of what happened in the collision which he had pleaded in paragraph 4 of his defence and counterclaim.

[17] The defendant had also testified that there were many vehicles along the road and that some cars were speeding so he sped as well. It was put to him that he was speeding at that time and he answered 'Yes'. It was put to him that he was speeding because he wanted to beat the traffic light before it turned red and he answered 'Yes'. The defendant said that he was driving at about 100km per hr at that time. The record of appeal showed that at that time, at about 9.40pm, the defendant was driving on the way back to Brunei and the immigration counters at the Sg Tujoh border crossing normally closed at 10pm. Although the defendant denied that he was rushing, the evidence showed that he was speeding and trying to beat the traffic light so that he could return to Brunei before the border crossing closed at 10pm.

[18] The trial judge did not refer to the above evidence in his judgment and had failed to appreciate the significance of the evidence of the defendant adduced at the trial when he assessed the respective liability of the parties.

[19] Although the defendant was speeding and trying to beat the traffic light, the evidence showed that there was a vehicle in front of the defendant's vehicle which had also tried to beat the traffic lights. The evidence showed that there was another vehicle in front of the first plaintif's vehicle which was also turning right at the junction towards Pasar Lutong. The first plaintif said that it was safe for this vehicle to turn right and so he followed this vehicle in doing so. However, both parties did not testify on the distance between their respective vehicle and the other vehicle in front of them, the speed of the vehicle, the colour of the traffic lights when these two other vehicles crossed the junction and so on.

[20] The first plaintif in turning right at the junction knew or should have known that there were vehicles entering the junction from the opposite direction. He knew or should have observed that these vehicles were travelling at high speed and it was reasonably foreseeable that there would be a collision if he turned right across the path of these vehicles if it was not safe to do so. In such a situation, the first plaintif should have waited at the traffic light to ensure that it was safe for him to turn right at the junction in order to avoid the collision notwithstanding his testimony that he had the green light.

[21] In not waiting and to avoid the collision he was guilty of contributory negligence. Based on the facts and circumstances of this case, the apportionment of liability should be 30 in favour of the first plaintif and 70 against the defendant. This apportionment is fair and equitable: see *Samar binte Mansor v Mustafa Kamarul Ariffin* [1974] 2 MLJ 71, *Poi Kuen Mun (f) & Ors v Ng Wei Choo* [1983] 2 MLJ 289, *Buhari bin Sabiren & Anor v Sea Kee Feng* [2000] MLJU 558; [2003] 8 CLJ 51.

[22] On quantum of damages, an appellate court is always slow to interfere with the trial judge's findings and award of damages. The appellate court can only interfere if it is satisfied that the trial judge has acted on a wrong principle of law or that he has misapprehended the facts or he has made a wholly erroneous estimate of the damages suffered: *Mahmod bin Kalian v Goh Seng Choon & Anor* [1976] 2 MLJ 239, *Tan Kuan Yau v Suhindrimani* [1985] 2 MLJ 22; [1985] 1 CLJ 429. If the assessment is inordinately low or inordinately high or if it is so much out of line with the discernible trend or pattern of awards in reasonably comparable cases, then the assessment may be regarded as a wholly erroneous estimate: *United Plywood And Sawmill Ltd v Lock Ngan Loi* [1970] 2 MLJ 237.

[23] The trial judge has awarded damages for the first plaintiff based on his apportionment of 50% liability. The damages were set out as follows:

General Damages:
First plaintifff (50% liability)

1. For loss of consciousness	= RM2,500
2. For long laceration of the left hemidiaphragm ruptured with herniaion of the stomach	= RM20,000
3. Cost of Nursing Care (RM700 X 6 months)	= RM2,100
4. Loss of earning capacity	= RM48,000
Total General Damages:	RM72,600

Special Damages:
First plaintifff (50% liability)

1. Medical charges at Columbia Asia Hospital	= RM1,591.40
2. Medical charges at Miri City Medical Centre	= RM9,229.50
3. Medical report by Dr Mathew Kho	= RM125
4. Purchase wheel chair	= RM145
5. Cost of repair of the Viva car	= RM400
6. Other miscellaneous claims which are transportation expenses, visitation by family & petrol expenses	= RM756.55
7. Loss of personal effects	= RM250
8. Loss of income	= RM4,500
Total Special Damages:	= RM16,997.45

General Damages:
Second plaintiff

1. Loss of consciousness with GCS of 10/15 to 8/15	= RM10,000
2. Left diaphragmatic with left disphragmatic hernia repair on 7 February 2012	= RM20,000

3. Left haemopneumothorax with left chest tube insertion on 7 February 2012	= RM15,000
4. Diffuse axonal injury with frequent attacks of headache and increasing forgetfulness	= RM100,000
5. Pelvic fracture (non displaced bilateral fracture of the acetabulum, right pubic fracture, left inferior pubic ramus fracture	= RM60,000
6. Left clavicle fracture with deformity of the left shoulder at the left clavicle, shortening of the left shoulder by 2cm, malunited fracture of the left clavicie	= RM20,000
7. Abdomen showed a scar at the midline 14cm long	= RM10,000
8. Diasthesis of the sysphsis of 1.5cm	= RM40,000
9. Osteoarthritis of the sacroiliac joint	= RM5,000
10. Cost of nursing care	= RM2,800
11. Costs of future operation and treatment and special shoes	= RM60,000
Total General Damages	= RM342,800
Special Damages:	
Second plaintiff (100% liability)	
1. Loss of earnings	= RM7,700
2. Other miscellaneous claims which are transportation expenses, visitation by family & petrol expenses	= RM457.25
3. Medical charges in Miri City Medical Centre	= RM8,675.40
4. Loss of personal belongings	= RM500
Total Special Damages:	= RM17,332.65

[24] The first plaintiff was admitted to MCMC on 7 February 2012 at 4 am and was treated by Dr Mathew Kho, the consultant surgeon at MCMC. He sustained (a) a ruptured left hemidiaphragm, (b) splenic injury and (c) cerebral conclusion. He underwent laparotomy on 8 February 2012. Intraoperative finding was splenic pedicle laceration wound which was still bleeding, long laceration of left hemidiaphragm with herniation of stomach into the left thorax and lots of intraperitoneal blood collection. Splenectomy was done, ruptured left hemidiaphragm was repaired and the haemorrhagic fluid was cleared and stomach decompressed.

[25] In his medical report (exh P5) dated 5 March 2012, Dr Kho stated post operatively that the first plaintiff recovered well with lung fully expanded the

following day, his wound healed well and he was discharged on 17 February 2012. Dr Kho stated that the first plaintiff should be able to return to normal activities in three months.

[26] The first plaintiff was referred to Dr Heng Aik Cheng, consultant and orthopaedic surgeon at Sabah Medical Centre, on the request of the defendant. Dr Heng examined the first plaintiff on 21 February 2013. Dr Heng testified that the first plaintiff has made good recovery from his injuries and should be able to return to his normal and daily activities. His medical report was marked as exh D4.

[27] Firstly, the trial judge awarded RM5,000 to the first plaintiff for loss of consciousness. The defendant (there is a typing error) is not appealing against this award. Based on the apportionment of liability made by this court, the first plaintiff should be awarded RM3,500 instead of RM2,500 for this injury.

[28] The first plaintiff submitted that he was seeking general damages of RM40,000 for the ruptured left hemidiaphragm and splenic injury, referring to *Teong Ai Meng v Tan Boon Seng & Anor* [2001] MCL (Dec) para 944, *Roslie b Husin v Vijayan a/l Subramaniam & Anor* [2007] 1 PIR 78 and *Zul Hasyimi b Shahidan & Ors v Mohana a/l Raja Gopal & Ors* [2011] 1 PIR 40 in support of his claim under this award. In *Hashim @ Hashim bin Md Yunus v Azman bin Abas & Anor* [1999] MD 539, cited by the counsel for the defendant, a sum of RM47,000 for multiple injuries including fractures of arm, perforated jejunum and lacerated spleen. An emergency laparotomy and splenectomy with bowel repair preformed. The defendant submitted that it should be RM30,000 instead of RM40,000.

[29] Based on these authorities cited by counsel, the award of RM40,000 for these injuries was within the range normally awarded by courts. The award made by the trial judge was not excessive, was within the range and there is no reason to disturb that finding. However, the first plaintiff should receive RM28,000 instead of RM20,000 based on the above apportionment of liability made by this court.

[30] On the cost of nursing care, the first plaintiff was cared by his parents at home. The trial judge awarded RM2,100 ie at RM700 for six months to the first plaintiff for the nursing care. There was no evidence whether his parents were gainfully employed and had to give up employment to look after him. There was no evidence of their salaries. There was also no evidence that he could not look after himself for six months.

[31] Dr Kho said that the first plaintiff was able to return to normal activities in three months. Dr Heng agreed with Dr Kho's assessment on this. The first

plaintiff in Q&A36 in his witness statement said that he was not able to walk for almost two months and he was not able to consume solid food for four months. Based on his testimony and the opinion of the two doctors, there was no basis for the cost of nursing care for six months. The cost of nursing care should be reduced to two months only in the sum of RM980 ie RM700 x 2 months x 70%.

[32] I shall deal with his loss of earnings and loss of earning capacity. The trial judge awarded the first plaintiff RM4,500 based on RM1,500 x 6 months x 50% liability. The trial judge assessed the salary of the first plaintiff at RM1,500 because he ruled that the payment vouchers, which showed that the first plaintiff was earning RM1,700, were only marked as ID. He said that there was no evidence that his salary was RM1,700 because his employer was never called to testify.

[33] The appeal record showed that, although his employer was not called to testify, the letter signed by his employer stating that his monthly salary at Liverpool Cafe was RM1,700. The defendant did not object to the admissibility of this letter which was tendered and marked as exh P22 by the trial judge. Once it has been tendered as exhibit with no objection of the defendant's counsel and there was no other evidence to contradict the content of this letter, there was no basis for the trial judge to reject that letter as evidence and to reject the sum of RM1,700 as the monthly salary of the first plaintiff at that time. Unfortunately the trial judge plucked the figure of RM1,500 out of the air and decided that the first plaintiff could be earning RM1,500 only as a cook. There was no basis for that conclusion in view of the evidence adduced in the trial.

[34] The appeal record, based on the medical reports, showed that the first plaintiff was able to return to his usual employment in three months' time. Therefore he should be working in three months' time. There was no evidence that he could not work for six months due to his injuries and there was nothing to prevent him from working after three months. There was also no evidence that he could not work until March 2013 due to his injuries when he commenced employment as a supervisor at Vege King earning RM1,000 per month. In fact the first plaintiff said that he resigned from his previous employment although he did not give any date of his resignation. Therefore there was no basis to award loss of earnings for six months to the first plaintiff. The loss of earnings should be adjusted to RM3,570 ie at RM 1,700 x 3 months x 70% based on the apportionment of liability made by this court instead of RM4,500 being 50% of his assessment of RM9,000.

[35] Although the first plaintiff submitted that he should be entitled to loss of future earnings, the trial judge did not award any loss of future earnings to

the first plaintiff. The first plaintiff did not appeal against that award and it is not an issue in this appeal.

[36] On the loss of earning capacity, the trial judge awarded a sum of RM96,000 calculated at RM500 x 12 months x the multiplier of 16 and reduced by 50% based on the apportionment of liability made by the trial judge. The first plaintiff was previously employed at Liverpool Cafe with a monthly salary of RM 1,700 whereas at the time of the trial he was employed at Vege King with a monthly salary of RM 1,000 only.

[37] Before an award of this nature can be entertained, there must be evidence to show that the first plaintiff would face a real or substantial risk in his earning capacity being affected in the future due to the disability he sustained from the collision: *Yang Yap Fong & Anor v Leong Pek Hoon & Anor* [1987] 1 CLJ 377, *Sumarni v Yow Bing Kwong & Anor* [2008] 1 MLJ 608; [2008] 3 CLJ 489.

[38] The medical report of Dr Kho, who treated him, did not state that the first plaintiff has a permanent disability or has sustained an impairment or handicap which would affect his earning capacity. In fact Dr Kho said that the first plaintiff should be able to return to normal activities in three months.

[39] About a year later, the first plaintiff told Dr Heng that he could not lift heavy load during his medical examination at Sabah Medical Centre. Subsequently, in his evidence in chief, the first plaintiff said that he was advised by his doctor not to lift heavy load. However he did not testify which doctor had advised him as such. Based on the two medical reports, the two doctors did not advise him not to lift heavy load. There was also no evidence on the weight or how heavy was the load that he could or was able to lift in his job. There was also no evidence whether he was required to lift any heavy load in his job.

[40] Therefore there was no evidence that the first plaintiff would face a real or substantial risk in his earning capacity being affected in future due to any disability sustained in the collision. The first plaintiff has not shown that he was entitled to the award on the loss of his earning capacity made in his favour by the trial judge. The appeal by the defendant on this appeal is allowed and the award of RM48,000 is set aside.

[41] On the special damages awarded to the first plaintiff by the trial judge, I have read the appeal record. Except for the loss of pre-trial earnings which I have dealt with, the special damages were reasonable and fair. There is no reason to disturb these special damages.

[42] Next, I shall deal with the general damages awarded to the second

plaintiff. On 7 February 2012 the second plaintiff was admitted to Miri Hospital. She was diagnosed with left diaphragmatic hernia, left haemopneumothorax and diffuse axonal injury. She undergone left diaphragmatic repair on the same night and admitted to ICU for 5 days. On 14 February 2012, upon request by family, the second plaintiff was transferred to MCMC to continue post operative care and physiotherapy under Dr Mathew Kho and Dr Richard Chen. At that time she was still confused under Glasgow's coma scale 14/15 but was able to recognise her family: see medical report of Dr Tan Sin Lih of Hospital Miri and exhibits P31, P32 and P33.

[43] Dr Kho prepared a medical report dated 14 June 2012 on the second plaintiff. The second plaintiff was transferred from Miri Hospital to MCMC on 14 February 2012 and was discharged on 21 February 2012. On 8 June 2012, Dr Kho reviewed the second plaintiff and he said the second plaintiff showed normal mental status and complete recovery of the power of the right lower limb. Her surgical scar had healed well although she claimed to have occasional abdominal pain. Dr Kho said that the second plaintiff did not need any long term follow-up and was fit to perform her normal daily activities.

[44] Dr Chen prepared a medical report dated 16 May 2012. He interviewed the second plaintiff on 7 May 2012 for this report. He said that the second plaintiff sustained the following injuries; (a) left diaphragmatic rupture, (b) cerebral concussion with diffused axonal injury of the cerebrum, (c) pelvic fracture, and (d) left clavicle fracture. She was treated at Miri Hospital with laparotomy and diaphragmatic repair whereas the two fractures were treated conservatively.

[45] The second plaintiff was limping noticeably when she walked into his clinic. The limping gait was due to shortening of the left limb and weakness of both hips. He said this was a permanent disability. He said there was a shortening of the left shoulder by 2cm compared to the right shoulder. He said the second plaintiff would have osteoarthritis over time.

[46] On 21 February 2013, the second plaintiff was on the request of the defendant's counsel referred to Dr Heng for a medical examination for the purpose of the trial. He saw her walking into his consultation room with a noticeable limp. He confirmed the injuries sustained by her as described in Dr Chen's medical report.

[47] Dr Heng found that the second plaintiff's left arm was weaker; she was weak in both legs and could not stand for long or walk long distances; forgot things easily; could not carry heavy objects; she felt pain when sitting on the floor and felt pain when she turned in her sleep. Dr Heng said that the second plaintiff had recovered well from her injuries and after intensive physiotherapy

for six months, she should be able to return to her normal work and daily activities.

[48] In respect of the awards to the second plaintiff for loss of consciousness, left diaphragmatic hernia, left haemopneumothorax and abdomen scar, I have read the submissions of the learned counsels for the parties and the grounds of judgment of the trial judge. The awards of RM10,000, RM20,000, RM15,000 and RM10,000 respectively were fair, reasonable and within the range of awards normally made by courts for such injuries. There is no reason to disturb those findings.

[49] In respect of the damages awarded to the second plaintiff for her diffuse axonal injury in the sum of RM100,000, the plaintiffs cited the case of *Cin Kon Wah @ Chin Kon Wah* [2009] 1 PIR [24] for head injury with Grade II diffuse axonal injury for an award of RM110,000. However, the plaintiff in that case as a result of the injury had suffered stool incontinence, post traumatic epilepsy, slight slurring of speech and tendency to laugh inappropriately. In *Andi Firdaus b Yusmar v Mohd Khir b Muda* [2009] 1 PIR [46], the plaintiff was awarded RM125,000 for Grade II diffuse axonal injury and as a result had suffered mood disorder and personality change and was unable to work.

[50] In this case, the second plaintiff's injury was not described as Grade II diffuse axonal injury. She did not suffer post traumatic epilepsy nor mood disorder or personality change. She was and is now working and she did not suffer any fracture to her skull. There was no medical report from any neurologist whether she would suffer any long term disability from her diffuse axonal injury. Based on the facts and circumstances in this case and on the medical reports, the award of RM100,000 is reduced to RM80,000 only.

[51] The trial judge had separately awarded RM60,000 for the fracture of the pelvis and another RM40,000 for the diasthesis of the sysphysis of 1.5cm. In para 7 of Dr Chen's report, he referred to the pelvic fracture only. He did not separately list out another head of injury as a diasthesis of the sysphsis of 1.5cm. In paragraph 10 of his same report he said that a CT scan of the pelvis showed the following injuries to the pelvic bone ie (a) non displaced bilateral fracture of the acetabulum, (b) right pubic fracture, (c) left inferior pubic ramus fracture, (d) left iliac body fracture, and (e) left sacral ala fracture. In para 22 of the same report, Dr Chen said that the left superior and inferior pubic rami have healed. There was diasthesis of the syphsis pubic of 1.5cm and the left sacral ala showed a healed fracture which was mal-united. Therefore the diasthesis should be dealt with together instead as a separate head of injury. Dr Heng also did not treat it as a separate head of injury. Therefore the trial judge had erred to treat it as a separate head of injury and awarded separate damages.

[52] I refer to the twenty two authorities cited by counsel for the plaintiffs which showed the range of damages awarded for such pelvic injuries ranging from RM20,000 to RM50,000 (see pp 814–815 of the appeal record) and for diasthesis of the syphysis pubis (at p 816 of the appeal record). The defendant submitted that the award for the pelvic fractures should be only RM40,000. The award for the pelvic fractures including the diasthesis of the syphysis pubis should be RM60,000 only. The separate award of RM40,000 for the diasthesis of syphysis pubis is set aside.

[53] On the damages of RM20,000 for the fracture of the left clavicle, I have read the submissions of the parties and the grounds of judgment of the trial judge, there is no reason to disturb the finding made by the trial judge on this head of award.

[54] Next, the trial judge had awarded RM5,000 for osteoarthritis of the sacroiliac joint, RM60,000 for costs of future operations, treatments and special shoes and RM10,000 for pain and suffering for future surgery based on Dr Chen's medical report. Dr Chen's report was based on his examination of the second plaintiff on 7 May 2012. Dr Kho examined the second plaintiff on 8 June 2012, about a month later. He did not state that the second plaintiff has suffered osteoarthritis of the sacroiliac joint or that she required future operations and treatments. In fact Dr Kho stated that the second plaintiff did not need any long term follow up and was fit to perform her normal daily activities. Similarly Dr Heng was of the same opinion when he examined the second plaintiff on 21 February 2013, about nine months later. Reading the three medical reports, Dr Kho's and Dr Heng's reports, which were later in time, were obviously different from that of Dr Chen and this raised doubts on his report. Based on the two reports, there was no evidence to support the claim for future operations, treatments and special shoes. For the reasons given, the trial judge had misconstrued the evidence and the awards of RM5,000, RM60,000 and RM10,000 respectively should not have been granted and are hereby set aside.

[55] In respect of the special damages awarded to the second plaintiff, I have read the submissions of the parties and the grounds of judgment of the trial judge. The awards were fair and reasonable and there is no reason to disturb those findings.

[56] The above appeals are allowed as set out in this ruling. Each party to pay their own costs.

Appeals allowed.

Reported by Afiq Mohamad Noor